The Cincinnati Enquirer, Inc., A Division of Gansat, Inc. *and* The Cincinnati Newspaper Guild, Local 9, The Newspaper Guild. Case 9-CA-21718 and 9-CA-21932

21 May 1986

DECISION AND ORDER

BY CHAIRMAN DOTSON AND MEMBERS DENNIS AND JOHANSEN

On 21 August 1985 Administrative Law Judge John H. West issued the attached decision. The Respondent filed exceptions and a supporting brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings, and conclusions only to the extent consistent with this Decision and Order.

In his decision the judge found that the Respondent violated Section 8(a)(1) of the Act by discriminatorily denying the Union, hereafter also called the Guild, access to company-owned employee mailboxes. We agree. The Respondent allowed its employees and "accredited" organizations, such as the Society for Professional Journalists and the employees' golf league, to have access to the mailboxes. The Respondent had also allowed the previous union, the Enquirer Editorial Employees Professional Association, to use the mailboxes to distribute its literature. In January 1985 the Guild requested permission to use the mailboxes to distribute its literature and was turned down by the Respondent.[1] The Respondent maintained that it allowed only company-sponsored organizations to use the mailboxes. Since January 1985 the Guild has sent its literature to its members via the United States Postal Service.

To remedy this violation, the judge recommended that the Respondent be ordered to cease and desist discriminatorily denying the Guild access to the employee mailboxes and that the Respondent reimburse the Union for its postal expenses incurred in the mailing of its literature to members. He concluded that, contrary to the Respondent's position, the so-called alternative means of communications available to the Guild were not effective.

The Respondent excepted, inter alia, to the judge's order to reimburse the Guild for its postal expenses, arguing that this remedy exceeds the magnitude of the violation. We agree.

We find that a "sufficient nexus" does not exist between the discriminatory conduct of the Respondent and the postal expenses incurred by the Guild.[2] Absent this "nexus," the reimbursement of the Union by the Respondent is not warranted.[3] The Guild made the decision to utilize the United States Postal Service to distribute its literature. We find under the circumstances of this case that it would not be appropriate to require the Respondent to reimburse the Guild for the voluntarily expended funds.

Further, we agree with the judge that the Respondent violated Section 8(a)(5) and (1) of the Act. Thus, the Respondent violated the Act (a) by unilaterally changing the duties of the wire manager and the pay of the bargaining unit members who substituted for and performed the duties of the wire manager, and (b) by unilaterally assigning bargaining unit work, which had previously been done by the fourth assistant features editor, to a supervisor, the deputy features editor, without notice to and bargaining with the Guild.[4]

We shall substitute the following amended conclusions of law for their counterparts.

AMENDED CONCLUSIONS OF LAW

"6. By discriminatorily maintaining and enforcing a rule prohibiting the Guild from using the Respondent's mailboxes for the distribution of union literature to employees while permitting employees and "accredited" and unaccredited organizations to use such facilities for the distribution of other than union-related literature, the Respondent violated Section 8(a)(1) of the Act.

"7. By unilaterally changing the duties of the wire manager and the pay of the bargaining unit members who substituted for and performed the duties of the wire manager without notice to and

[1] The Guild was certified as the exclusive collective-bargaining representative of the employees in the bargaining unit on 24 December 1984

[2] Cf *Laborers Northern California Council (Baker)*, 275 NLRB 278 (1985), *Carpenters Local 953 (Corbesco, Inc.)*, 272 NLRB 70 (1984)

We note that the Guild had at least two avenues of communication to its members It had access to some of the Respondent's bulletin boards and to the employees' desks While these means may not have resulted in 100-percent communication, we find them to be acceptable in these circumstances

[3] In effect, the General Counsel, in seeking a reimbursement remedy here, is requesting a remedy akin to one directing reimbursement of a union's organizing or negotiating expenses The Board has long held that such reimbursement remedies are extraordinary ones that will be imposed only in very limited circumstances See, e g , *Heck's Inc*, 215 NLRB 765 (1974), *Wellman Industries*, 248 NLRB 325 (1980), and *Workroom for Designers*, 274 NLRB 840 (1985)

[4] The precise violations which we have found vary slightly, but not materially, from the allegations in the complaint The parties were cognizant of the issues involved, and all issues were fully and fairly litigated at the hearing

In finding that the Respondent violated Sec 8(a)(5) by unilaterally assigning bargaining unit work to a supervisor, we rely on, in addition to the case cited by the judge, *Talbert Mfg, Inc*, 264 NLRB 1051 (1982)

bargaining with the Guild, the Respondent violated Section 8(a)(5) and (1) of the Act.

"8. By unilaterally assigning bargaining unit work, which had previously been done by the fourth assistant features editor, to a supervisor, the deputy features editor, without notice to and bargaining with the Guild, the Respondent violated Section 8(a)(5) and (1) of the Act."

AMENDED REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, we shall order the Respondent to cease and desist and to take certain affirmative actions designed to effectuate the policies of the Act.

The Respondent having discriminatorily denied the Guild access to the employee mailboxes, we shall require it to cease and desist therefrom.

Having found that the Respondent violated Section 8(a)(5) and (1) of the Act by changing the duties of the wire manager and the pay of the bargaining unit members who substituted for and performed the duties of the wire manager and by unilaterally assigning bargaining unit work, which had previously been done by the fourth assistant features editor, to a supervisor, the deputy features editor, without notice to and bargaining with the Guild, we shall order the Respondent (1) to rescind these changes, and (2) to notify and bargain with the Guild concerning any contemplated changes in the wages, hours, working conditions, and other terms and conditions of employment of the bargaining unit employees. We shall also order the Respondent to make the bargaining unit employees whole for any loss of earnings they may have suffered, including interest, in the manner prescribed in *Ogle Protection Service*, 183 NLRB 682 (1970); and *Florida Steel Corp.*, 231 NLRB 651 (1977), and to post an appropriate notice.

ORDER

The National Labor Relations Board orders that the Respondent, The Cincinnati Enquirer, Inc., A Division of Gansat, Inc., Cincinnati, Ohio, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discriminatorily maintaining and enforcing a rule prohibiting the Guild from using the Respondent's mailboxes for the distribution of union literature to its members.

(b) Refusing to bargain collectively with the Guild, as the exclusive representative of the employees in the bargaining unit found appropriate, by unilaterally changing the duties of the wire manager and the pay of the bargaining unit members who substituted for and performed the duties of the wire manager, and by unilaterally assigning bargaining unit work, which had previously been done by the fourth assistant features editor, to a supervisor, the deputy features editor, without notice to and bargaining with the Guild.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Rescind the unilateral changes made with respect to the wire manager position and the fourth assistant features editor position in the Tempo department.

(b) Make whole with interest any bargaining unit employee who lost wages as a result of the unilateral changes made in the duties and pay of the employees who substituted for and performed the duties of the wire manager, in the manner set forth in the "Remedy."

(c) On request, meet and bargain collectively with the Guild, as the exclusive bargaining representative of the employees in the unit, concerning rates of pay, wages, hours of employment, and other terms and conditions of employment and any contemplated changes therein and, if an understanding is reached, embody such understanding in a signed agreement.

(d) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(e) Post at its Cincinnati, Ohio facility copies of the attached notice marked "Appendix."[5] Copies of the notice, on forms provided by the Regional Director for Region 9, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(f) Notify the Regional Director in writing within 20 days from the date of this Order what steps have been taken to comply.

[5] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT discriminatorily maintain and enforce a rule prohibiting The Cincinnati Newspaper Guild, Local 9, The Newspaper Guild (The Guild) from using our employees' mailboxes for the distribution of union literature to employees.

WE WILL NOT refuse to bargain collectively with the Guild, as the exclusive representative of the employees in the bargaining unit listed below, by unilaterally changing the duties of the wire manager and the pay of the bargaining unit members who substituted for and performed the duties of the wire manager, and by unilaterally assigning bargaining unit work, which had previously been done by the fourth assistant features editor, to a supervisor, the deputy features editor, without notice to and bargaining with The Guild. The appropriate unit is:

> All employees employed by the [Employer] in its editorial division including the assistant news editor, copy desk chief, picture editor, chief photographer, assistant metro editors, assistant features editors, assistant sports editors, Sunday sports editor, editorial writers, letters editor/editorial page secretary, editorial cartoonists, news production coordinator and systems editor, but excluding all interns, editorial division secretaries (confidential), the reader editor, the editor, the managing editor, the assistant managing editor, the associate editor, the graphic editor, the features editor, the metro editor, the news editor, the news office budget manager, the deputy graphics editor, the deputy metro editor, the Kentucky bureau chief, the business editor, the assistant metro editor in charge of outlying bureaus, the sports editor, the chief librarian, and all other supervisors, professional employees, and guards as defined in the Act.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL rescind the unilateral changes made with respect to the wire manager position and the fourth assistant features editor position in the Tempo department, these changes having been made without notice to and bargaining with the Guild.

WE WILL make whole, with interest, any bargaining unit employee who lost wages as a result of the unilateral changes we made in the duties and pay of the employees who substituted for and performed the duties of the wire manager.

WE WILL, on request, meet and bargain with the Guild, as the exclusive bargaining representative of the employees in the unit, concerning rates of pay, wages, hours of employment, and other terms and conditions of employment and any contemplated changes therein and, if an understanding is reached, embody such understanding in a signed agreement.

THE CINCINNATI ENQUIRER, INC., A DIVISION OF GANSAT, INC.

James E. Horner, Esq., for the General Counsel.
Joyce T. Bailey, Esq., and *John B. Jaske, Esq.*, of Arlington, Virginia, for the Respondent.
Paul Furiga, for the Charging Party.

DECISION

STATEMENT OF THE CASE

JOHN H. WEST, Administrative Law Judge. On a charge filed 8 February 1985[1] in Case 9-CA-21718 by the Cincinnati Newspaper Guild, Local 9, The Newspaper Guild (the Guild), a complaint was issued against The Cincinnati Enquirer, Inc., a Division of Gansat, Inc. (Respondent) on 19 March. On 12 April the Guild filed another charge, in Case 9-CA-21932 against Respondent and the two cases were consolidated in a complaint issued 17 May. As here pertinent the consolidated complaint contains the following allegations:

> 5. Since on or about January 22, 1985, Respondent . . . at its facility, discriminatorily maintained and enforced a rule prohibiting the Union [The Guild] from using Respondent's mailboxes for the distribution of union literature to employees while permitting employees to use such facilities for the distribution of other than union related literature.
>
> 6. The following employees of Respondent, hereinafter called the Unit, constitute a unit appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act:
>
> > All employees employed by the [Respondent] in its editorial division including the assistant news editor, copy desk chief, picture editor, chief photographer, assistant metro editors, assistant features editors, assistant sports editors, Sunday sports editor, editorial writers, letters editor/-editorial page secretary, editorial cartoonists, news production coordinator and system editor, but excluding all interns, editorial division secre-

[1] All dates are in 1985 unless stated otherwise

taries (confidential), the reader editor, the editor, the managing editor, the assistant managing editor, the associate editor, the graphic editor, the features editor, the metro editor, the news editor, the news office budget manager, the deputy graphics editor, the deputy metro editor, the Kentucky bureau chief, the business editor, the assistant metro editor in charge of outlying bureaus, the sports editor, the chief librarian, and all other supervisors, professional employees, and guards as defined in the Act.

7. On December 24, 1984 the Union was certified as the exclusive collective bargaining representative of the Unit.

8. At all times since December 24, 1984 the Union, by virture of Section 9(a) of the Act, has been, and is, the exclusive representative of the Unit for the purposes of collective bargaining with respect to rates of pay, wages, hours of employment and other terms and conditions of employment.

9. (a) Sometime in early January 1985, the exact date being unknown to the undersigned, Respondent changed the duties and pay of its wire editor.

(b) On or about March 21, 1985 Respondent unilaterally changed an assistant features editor position in the Unit to a supervisory position.

(c) Respondent engaged in the acts and conduct described above in paragraphs 9(a) and (b) without prior notice to the Union and without having afforded the Union an opportunity to negotiate and bargain as the exclusive representative of Respondent's employees with respect to such acts and conduct and the effect of such acts and conduct.

10. By the acts and conduct described above in paragraph 5, Respondent has interfered with, restrained with, restrained and coerced, and is interfering with, restraining and coercing, employees in the exercise of rights guaranteed in Section 7 of the Act and Respondent thereby has been engaging in unfair labor practices within the meaning of Section 8(a)(1) of the [National Labor Relations] Act [Act].

11. By the acts and conduct described above in paragraph 9, and by each of said acts, Respondent has failed and refused, and is failing and refusing, to bargain collectively and in good faith with the representative of its employees, and Respondent thereby has been engaging in unfair labor practices within the meaning of Section 8(a)(1) and (5) of the Act.

Respondent denies violating the Act.

A hearing was held in Cincinnati, Ohio, on 26 June 1985. On the entire record in this case, including my observation of the demeanor of witnesses, and consideration of the briefs, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent, a Delaware corporation, with an office and place of business in Cincinnati, Ohio, is engaged in the publication, circulation, and distribution in the Cincinnati area of The Cincinnati Enquirer, a daily newspaper. The complaint alleges, the Respondent admits, and I find that at all times material herein Respondent has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

A. *The Facts*

For approximately 40 years the Enquirer Editorial Employees Professional Association (EEEPA), an independent union, represented editorial employees at Respondent. Its literature was distributed to its members via employee mailboxes at Respondent's facility.[2] The mailboxes are also utilized to disseminate material from the Society of Professional Journalists. (G.C. Exh. 3.) The announcements of social events such as parties that employees are having off the premises are disseminated to employees through use of the involved mailboxes. Additionally, the employee golf league, called the Duffer's League, uses the mailboxes.

On 17 December 1983 EEEPA held a membership meeting and decided to affiliate with the Guild. Later that month, when there was an attempt to distribute the mid-December edition of the Guild Reporter, it was removed from the mailboxes by Respondent's management. Its news office budget manager, Ron Wild, advised employees Paul Furiga, who since 21 March had been the Local's president and before that was president of the involved unit, that Respondent's legal counsel pointed out that since two organizations, The Guild and employees attempting to revive EEEPA, sought to represent the involved employees and since Respondent did not want to show favor to either group, neither one would be allowed to use the mailboxes during the pendency of the representation proceeding, Case 9-RC-14411.

As noted above, The Guild was certified in December 1984. About 1 month later the secretary of the involved unit, Karen Garloch, asked for and was denied permission to use the office mailboxes for distribution of The Guild's material.[3] As an alternative, the Guild uses the United States Postal Services and up to the time of the hearing herein it had incurred expenditures of approximately $220. Garloch testified that other alternatives which the Guild has used are employee bulletin boards and information is dropped on employees' desks. Furiga testified that Respondent would not let the Guild use all the bulletin boards and its communications are routinely pulled down from some of the boards; and that information cannot be dropped off on each employee's desk because not every employee has a desk.

Wild testified that Respondent permits "accredited" organizations such as the Society for Professional Journalists to use the employees' mailboxes because Respond-

[2] For examples of the distribution see G C Exhs 2(a) through (g)

[3] Subsequently, the Guild's request to use the office mailboxes was put in writing (G C Exh 4) At the time of the hearing herein the Guild was still prohibited from using them

ent traditionally paid the dues of Respondent's employees to this organization;[4] that "employees . . . use the mailboxes to notify one another of parties and that type of thing"; that Respondent has a list of "accredited"organizations and that the Guild is not on the list because it is not a company-sponsored organization; that he has personal knowledge about the use of the mailboxes for social gatherings and is aware that none of the social organizations is on the "accredited" list; that the news division's golf league, the Duffer's League, uses the involved mailboxes and it is not on the "accredited" list; and that on occasion nonemployee individuals have not been allowed to distribute material at Respondent's facility.

Editor George Blake testified that it was his decision not to allow the Guild in 1985 to use the employees' mailboxes because he believed that "is an issue, as it had been in the past, that should be bargained about."

On the date indicated, the following exchange (G C. Exhs. 5, 6, 7, and 8, respectively) was initiated by Furiga:

George R. Blake
Editor
The Cincinnati Enquirer
617 Vine St.
Cincinnati, Ohio 45201

Tuesday, Feb. 5, 1985

Dear George,

Several news desk staffers have informed me that the wire editor's job has been unilaterally restructured by the company to change hours, working conditions and pay.

The net effect of this change is that B classification copy editors [unit members] who work the job [temporarily] are now getting B class pay instead of the A class pay that has been traditional with the job. For a copy editor who fills this job five days a week, this represents a loss of $30 per week.

It is clearly a legal requirement, George, for the company to bargain with the union when it intends to make changes that will affect the terms and conditions of employment for bargaining unit employees.

Such is the case with this job and I am hereby requesting a meeting at your earliest convenience to amicably discuss this matter.

If such a meeting is not forthcoming, the Guild will be forced to defend the rights and the economic interests of its members by filing an unfair labor practice charge for failure to bargain in good faith. We plan to do so if we have no response from you by 5 p.m. Wednesday.

It is clearly the Guild's intent to settle this matter amicably and that is why I ask for a meeting at your earliest convenience. We are, however, prepared to take action in whatever forum is dictated by your responses.

Date: 2/20
To: PAUL

Denny and I would be happy to meet with you to answer questions you may have about the new wire-coordinator job.

If you'd like to meet, just shout or drop me a note.

Jim Smith

Jim Smith
News Editor
The Cincinnati Enquirer

Friday, Feb. 22, 1985

Dear Jim,

Thank you for your note of Feb. 20. I would be delighted to sit down with you and Denny Doherty to discuss the changes you want to make in the wire editor's job.

However, as a pre-condition to any such meeting, the company must restore the status quo. That consists of:

1) Restoring A classification pay for the job.

2) Paying all lost wages to all those who have worked the job in the last several weeks at B scale wages.

3) Restoring the job description and duties that were in place before the company's unilateral changes

Once the Guild has an assurance the above actions have been taken, our negotiating committee is ready and willing to sit down and discuss any changes management desires for the wire editor's job.

I look forward to your prompt response.

Sincerely,

Paul Furiga
Enquirer Unit president

cc: Denny Doherty
George Blake
negotiating committee

February 22, 1985

PAUL:

With regard to your note of today, if you choose to meet with us, you will find the new computer system has done away with the wire manager's position. The work of copy editor is and continues to be B classification work.

Since there is no wire manager, there is no justification for A classification pay for copy editors. Thus we do not agree to any of your preconditions for a meeting

If you still want to meet, please let me know.

Sincerely,

Jim Smith
News Editor

[4] See R Exhs 1 and 2

By letter dated 27 February Furiga responded to Smith, indicating, inter alia, that "The Guild is still willing to meet and discuss any changes you would propose for the wire editor's job. However, we must stick to the preconditions to which we are entitled under law."[5]

Copy editor Elaine Hiruo testified that since 1982 she had had occasion to work in the wire manager's position filling in on vacation or sick days; that in 1984 she was paid "B" scale as a copy editor and "A" scale if she worked the wire manager's job for a day; that "A" scale is higher pay; that in 1984 the wire manager had a particular desk with a particular VDT to work with; that she stopped receiving "A" scale for working in the wire manager's position in January or February 1985; that up to the spring of 1985 the wire manager's job had not changed basically and in fact there were additional duties at that time; viz., putting together the second page of the first section, A-2, dealing with the weather package, small items on a regional, national, and international basis, "Today in History," some filler, and corrections; that when she first realized that she was no longer getting "A"scale she was still sitting at the same desk and using the same wire manager's VDT; that the wire manager's position required "the use of . . . news judgment, perhaps more so to an extent since—than what you might be using if you were normally sitting there, working as a copy-editor"; and that when the job ceased to exist in May 1985 there were still functions which had to be handled, namely, "printing out the budgets, going through the queues and killing some of the old stories, just sorting through, also being asked to help on—with the A-2 package, which is a briefs package that we now do."

Certain of the witnesses called by Respondent testified about the wire manager's job. Deputy Managing Editor James Doherty testified that the position of wire manager was created for him in 1979; that he left the job in 1982 and it was restructured; that the last full-time wire manager was Phil Fisher who left in the fall of 1984 for temporary duty at Gannet News Media; that the wire manager position was created as a class "A" pay position; that copy editors are class "B"pay positions; that it is necessary to spend 4 hours or more working in the wire manager's position before one could obtain the higher classification pay; that in January 1985 Respondent ceased paying copy editors the "A" rate when they filled in for the wire manager; that he learned of this from Wild, who told him that Respondent was not going to pay the higher class for what was left of the wire manager's job; that in January 1985 the wire manager's job was receiving the foreign and national (when the national editor was not there) wires, helping the telegraph editor lay out the main news pages and setting type for the "windows" on page one of the newspaper (boxes highlighting featured stories elsewhere in the paper); that in January 1985 the wire manager's position was a full-time position; that copy editors do not generally recommend news stories because it is not part of their function and it has never been part of their job description; that in January 1985 when the copy editors filled in on the wire manager's position 100 percent of their time was spent performing wire manager's functions; and that Respondent saved the wire manager's job for Fisher because he was on loan to another division of the parent company and when Fisher returned in March 1985 he was offered the wire manager's job—"[t]he job was still there"—but he did not want it.

Jim Smith, who became the news editor in "early" January 1985 testified that at the time of the trial herein he did not have any copy editors performing 4 hours of work doing wire manager's work; that

> The only—well, the only portions [of the wire manager's job] that really remained when I became news editor were the what little sorting or purging of baskets had to be done, which was minimal, and basically printing budgets, and that's all. The windows also. I'm sorry. The promotional window;

and that at the time of the hearing herein copy editors recommended news stories only at the discretion of the assistant news editor in that he may ask them to review part of the foreign or national report and make recommendations.

Smith gave the following testimony on cross-examination:

> Q. Ever worked in close conjunction with the wire manager?
>
> A. I did for—yeah, my first week or two job.
>
> Q. What year are we talking about?
>
> A. 1985.
>
> Q. Okay. What occurred at that time?
>
> A. You mean in respect to the wire manager's job?
>
> Q. Correct.
>
> A. It was my observation that there was—well, first of all, the person assigned to wire manager was only being assigned there a half shift. It was my observation that the work that was being done took far less time than even a half shift would require. There was very little to do, and it was a source of concern among those who were being assigned to that, as well as to Mr. Fisher.
>
> Q. Mr. Fisher wasn't there in January 1984 [sic].
>
> A. No, but I have had conversations with him.
>
> Q. Okay. In January of 1985, were the copy-editors still being rotated to that job?
>
> A. Only for the first couple of weeks after I took over. I stopped assigning people to that job after that.
>
> Q. Who did the job thereafter?
>
> A. Well, as I said, there were not many duties that remained for that job. But the couple of duties that did remain were assigned to the copy-editors.
>
> Q. Did you ever perform that duty on a full-time basis, the wire editor—wire manager?
>
> No.
>
> Q. Did it ever come to your attention that the "A" scale classification for that job was dropped?

[5] Furiga testified that the management of the Enquirer never notified him in advance that it intended to change the pay for the substitutes for the wire manager's position.

A. Yes.

Q. Who told you about that?

A I—after the first—well, the "A" scale classification for that job was not dropped. The job was dropped. Copy-editors were assigned into different duties. I asked for a ruling on whether or not that was "A" classification and was told it was not.

Q. Did Mr. Fisher sit at [a] particular desk and use a particular VDT when he had the job?

A. Yes, he did.

Q And when he went to *USA Today*, were other employees called in to perform that work?

A For a half-shift, yes.

Q. Only for a half-shift?

A. Yes.

Q. Each and every day?

A. I can't testify before I took over the news desk. Afterwards the assignments that already had been made prior to my coming over were for a half-shift. I believe it was. I could be wrong.

Q. Only for a half-shift? There never was any occasions when copy-editors worked the full shift?

A. If there were, I am unaware of them. It would have been before I became the news editor.

Prior to March 1985 Respondent had four assistant features editors in the Tempo department. It was Respondent's position in the above-described representation proceeding that all four were supervisors and consequently should not be included in the unit. In his Decision and Direction of Election the Regional Director disagreed and, as noted above, they were included in the involved unit. One of the four, Kerry Klumpe, left the department to become business editor. Subsequently, the following memorandum (G.C. Exh. 10) was posted on bulletin boards at Respondent's facility:

Date: March 21, 1985
To: Staff
Linda Cagnetti will join the Tempo staff as Deputy Features Editor effective April 8. She will supervise all Tempo writing and graphics assignments and select stories for the Tempo covers. Linda is the former Assistant Managing Editor/Features and Features Editor for the Cincinnati Post.

John Kiesewetter

This memorandum prompted the following exchange (G.C. Exhs 11, 12, and 14, respectively):

John Kiesewetter
Features Editor
The Cincinnati Enquirer

Thursday, March 21, 1985

Dear John,

This is to request a grievance meeting at your earliest convenience in regards to the appointment of Linda Cagnetti as deputy features editor.

As you are aware, the editorial division contract requires that management post all job openings at least three days prior to considering outside applicants. The contract makes no distinctions between exempt or non-exempt jobs, or new jobs old jobs.

As this provision represents past practice, and as management has made no attempt to bargain a change in this status quo condition with the union, we are requesting a meeting.

It's the Guild's hope that we can settle this matter quickly and amicably. I look forward to your response.

Sincerely,

Paul Furiga
Enquirer Unit president

cc: George Blake
Gary Watson
Jim Robinson
executive committee

Date: 3/22/85
To: Paul Furiga

Re: Your letter to John Kiesewetter dated March 21, 1985

1. Past practice of The Enquirer has been to post only non-exempt positions. Numerous examples exist of exempt-level positions filled without posting: news editor, regional editor, Kentucky editor, deputy metro editor, deputy sports editor, deputy managing editor, etc.

2. We consider the newly created position of deputy features editor to be clearly supervisory and therefore exempt. The Guild has no standing in this matter.

George R. Blake
Editor and Vice President

George R. Blake
Editor
The Cincinnati Enquirer

Friday, April 12, 1985

Dear George,

More than two weeks have lapsed since I last wrote you concerning management's unilateral and violative actions in regards to the deputy features editor. A[t] this point, I am taking your lapse to mean no response is forthcoming.

Had management met its duty and responded with a meeting, the Guild would have made these points:

1) It is a violation of the National Labor Relations Act to make unilateral changes in the title and duties of a job ruled within the bargaining unit by the National Labor Relations Board.

The unilateral action is particularly onerous since we are barely five months and five days past the signing of a massive NLRB ruling on that topic.

2) The unilateral action is a blatant break with the status quo and past practice, for someone was hired for the job from outside the company without the posting required by our last union contract.

Management's failure to bargain these issues, as the law requires, has prompted yet another violation of the National Labor Relations Act, failure to bargain in good faith.

Upon that basis, the Guild has filed this morning an Unfair Labor Practice against management.

Sincerely,
Paul Furiga
local president

Respondent did not respond to Furiga's 12 April letter.

Furiga testified that he did not receive notice regarding Cagnetti before the above-described 21 March memorandum was posted; that prior to 22 March no member of management of Respondent notified the Guild that Respondent was considering the creation of a deputy features editor position as a supervisory position; and that Respondent did not attempt to negotiate with the Guild regarding the creation of this deputy features editor position.

Blake testified that, before Klumpe left the position of assistant features editor, Blake discussed with Kiesewetter, among others, the creation of a higher level position in the Tempo department, and that Respondent did not make any attempt to negotiate with the Guild or even inform the Guild that Respondent was "considering changing the deputy features editor position to a supervisory position."

Kiesewetter testified that the duties of the deputy features editor include supervising the assistant editors, the copy-editors, and the reporting staff; assigning work to the assistant editors and the copy-editors; being in charge when he is absent or not in his office; making assignments to writing staff; and working closely in developing stories, crafting the story, editing the stories, rewriting the stories; and selecting the stories for the Tempo cover daily. Kiesewetter also testified that the deputy features editor position is not equivalent to the old assistant features editor position; that Cagnetti has attended the daily news conference at 2 o'clock when all the departments come together and talk about the stories that they have going or going to be published in the next day's paper and she has done that as his representative when he has been busy or tied up on other things; that Cagnetti is paid on a higher wage scale than the other assistant features editors; that Cagnetti receives different fringe benefits from the other assistant features editors in that she qualifies for the annual physical program that other exempt employees do, and her health benefits are along the line of exempt employees; that Cagnetti can and has recommended someone for hire; that when he knew he was losing Klumpe he discussed with Blake what options he would have in restructuring the department, and he asked Blake if he created a deputy position would Blake agree and Blake said, yes; that Blake said it would be considered an exempt position; that Cagnetti has the authority to assign overtime and he believed she did the week before he testified herein when he was on vacation for the entire week; and that Cagnetti was in charge of the department in his absence.

On cross-examination, Kiesewetter testified that when he gave evidence at the hearing on the representation petition in 1984 it was his position that all the assistant features editors were supervisors; that in support of that position, he described what he regarded as the supervisory duties of Kerry Klumpe; that Cagnetti's "role with working with the writing staff and making assignments, generating assignments, working with reporters as they develop, write, and at her request and direction rewrite stories—it's much more hands-on than . . . [Klumpe's] role"; that Klumpe had hands-on rewriting, and made assignments on occasion, and also represented the Tempo department at the news budget meeting in Kiesewetter's absence; that Cagnetti is in charge of the writing assignments of all the features writers, and she keeps track of what each writer is doing, makes sure that each reporter has assignments for every given week, which a year ago he was doing; that Klumpe did this for a brief period of time during January and February 1985; that the assistant editors would gather in his office and they would discuss story ideas, and Klumpe would sit down at the VDT and write a list of story assignments for each reporter with no prediscussion with the reporter, and Klumpe would send it electronically into a basket and then send everyone a message saying, "These are your writing assignments"; that the past approach was not a hands-on process, and there was virtually no followup; that since the hire of Cagnetti, there have been no additional hires in his department, outside of the summer interns; that he had four assistant features editors in January 1985; that at the time of the trial herein he had only three; that he intends to have only three; that at the representation petition hearing he testified that Klumpe was in charge of the Tempo department in Kiesewetter's absence; and that since she was hired Cagnetti has not disciplined anyone, issued reprimands of any kind, hired anyone, suspended anyone, laid off anyone, recalled anyone, transferred anyone in and out of the department, recommended anyone for promotion, or recommended anyone for a pay increase. Of course at the time of the trial herein she had only been in the position for a limited period.

Cagnetti testified that as deputy features editor in the Tempo department she assigns and helps develop story ideas, assigns and directs the daily production of the Tempo section, is responsible for the long-range content direction of the section, directs the assistant editors (whether it is layout work or their editing), and assigns work to reporters; that when she assigns the work to the reporters, she checks in with them to see if the work is developing as they had planned, and as the writer turns a story in to her, she edits it for content to determine whether it is on track; that she sets priorities for the writers; that she sometimes, after looking at a story, decides she does not want the story after all, and it is rejected or canceled; that she has granted overtime requests of employees; that she is paid on a higher scale than the other assistant features editors and her benefits are different from the other assistant features editors in that she receives the same benefits as exempt employees including health insurance; and that 90 to 95 percent of her time is spent assigning work to other people.

Jennifer Schwertman, who has been an assistant features editor in the Tempo department since January 1984, testified that she was first notified about that filling of Klumpe's position when Kiesewetter requested Jim Knippenberg, who is also an assistant features editor, and her to talk to him in his office before it was announced to the rest of the staff; that it was about an hour before the announcement and Kiesewetter informed them that he had found a replacement for Klumpe, that it was Cagnetti, who had previously worked for the Cincinnati Post, and she would be filling the position of deputy features editor and would be in charge of the Tempo department in his absence and would be taking over Klumpe's duties; that since Cagnetti has been working in the Tempo department, she observed her doing basically about the same thing Klumpe has always done; that Cagnetti works at the same desk where Klumpe worked; that Cagnetti makes story assignments to the Tempo staff reporters; that Klumpe also did that; that the only thing Cagnetti does that was formerly not done by Klumpe is that she goes to a lot more meetings than he ever did; and that she sits 3 feet from Cagnetti's desk and has never observed Cagnetti acting in any way in a supervisory capacity.

Donna Vonderhaar, who is a copy editor in the Tempo or features department, testified that when Klumpe was the assistant features editor, she worked closely with him and he

> would pretty much decide what went on the cover day-to-day, with some input from myself and the other assistant—myself and the assistant editors. I'm an untitled copy-editor. We would suggest stories and he would pretty much decide the stories and then he would lay out the page and bring the page back up and then he, the other assistant editors, and myself would edit the stories, write the headlines and that sort of thing. He was the lead—he usually took the lead;

that she sits about 4 feet from Cagnetti, as she did from Klumpe, and she has observed Cagnetti acting in a supervisory capacity "in the same way that . . . [Klumpe] did—makes the story assignments and then sees that the stories, once they're in—sees that they're in and coordinates the photo and the art assignments, all the graphics"; that those are the same things that Klumpe did when he was the assistant features editor; and that there was nothing else that she has observed Cagnetti doing in the way of acting in a supervisory capacity other than story assignments and coordinating.

B. *Analysis*

In my opinion Respondent has violated the Act as alleged.

The General Counsel contends that once an employer opens its normal means of communications to employees for all employee organizations for all sorts of purposes, whether "accredited" or unaccredited, then that employer must open the same means of communication to a union. Respondent argues that discrimination should only be found when the Guild has been denied an effective means of communicating with its members, which assertedly is not the case here because the information could have been placed on employee bulletin boards or employee desks. Respondent does not cite a case in support of this argument. Respondent also submits that the remedy sought, namely, the reimbursement of expenses incurred in the use of the U.S. Postal Service, is extraordinary and inappropriate. It was demonstrated that the so-called alternative means are not effective. Moreover, the issue of discrimination here is whether Respondent can lawfully assent to employee access to the mailboxes and access by "accredited" and unaccredited organizations, including the former independent union, while refusing to allow the Guild to use this means of communication. Here Respondent disparately denied the Guild access to the mailboxes in January 1985 in violation of Section 8(a)(1) of the Act. *Vincent's Steak House*, 216 NLRB 647 (1975). In view of the circumstances involved herein, the remedy sought is appropriate and will be recommended.

Regarding the wire manager's position, the General Counsel contends that because the Guild was certified and because they were mandatory subjects of bargaining, it was incumbent on Respondent to bargain with the Guild before changing the wages and working conditions relating to this position. Respondent contends that no unilateral change occurred; but rather through a gradual process of evolution the duties of the wire manager were either shifted and/or abolished to such an extent that the job as it previously existed no longer remains. Unilateral changes in wages, hours, and terms and other conditions of employment, during a period in which an employer is required by law to bargain with the exclusive collective-bargaining representative of the employees, violates Section 8(a)(5) of the Act. *NLRB v. Katz*, 369 U.S. 736, 747 (1962). One of Respondent's witnesses testified that the wire manager's job was a full-time job at a point in time after the Guild was certified. This is in accord with the testimony of the General Counsel's witness who is a unit member and who was detailed to the position at that time. Respondent never bargained nor offered to meet and to bargain with the Guild over the changes and, therefore, in unilaterally making these changes Respondent violated Section 8(a)(1) and (5) of the Act. *Technicolor Government Services*, 268 NLRB 258 (1983).

With respect to the allegation that Respondent unlawfully unilaterally changed an assistant features editor position in the unit to a supervisory position, the General Counsel argues as follows at page 11 of his brief:

> [W]hat Respondent has done is nothing more than change the title of the job. Cagnetti now sits at Klumpe's old desk, performing the same or similar duties that Klumpe previously performed. It is obvious that Respondent is determined to countermand the Regional Director's finding, and by fiat, has declared that position to be supervisory. At the very least, the decision to transform Klumpe's old position into a supervisory one has had an impact on the bargaining unit, and, therefore, Respondent had a mandatory duty to bargain with the Guild over this decision. Since it is clear that Respondent did

> not bargain with the Guild over the creation of this alleged supervisory position, and that position's effect on bargaining unit work, Respondent has . . . violated Section 8(a)(1) and (5).

Respondent, citing *Wincharger Corp.*, 172 NLRB 83 (1968), submits that the Board has found lawful the reclassification of a bargaining unit position to a supervisory one when there is no evidence that the unit employees have suffered any financial loss, loss of overtime, and where the change is de minimis. It is argued by Respondent that a balance must be struck between infringing on an employer's rights to create supervisory positions, clearly a management right, and the duty to bargain; and that here the balance must be struck in favor of the Employer's right to create a new supervisory position.

As the General Counsel pointed out, the Board in *Fry Foods*, 241 NLRB 76 (1979), affirmed the conclusions of an administrative law judge that "the reclassification of a position from a bargaining unit job to a nonunit job is a mandatory subject of collective bargaining if the reclassification has an impact on bargaining unit work" and "[h]ere the impact is quite clear because the new supervisor . . . continued to do . . . [unit] work." As noted above, while the Tempo department had four assistant features editors in the past, it is Respondent's intent to now have only three with Cagnetti performing most of the duties formerly performed by the fourth. In my opinion Respondent's creation of the deputy features editor position had an impact on bargaining unit work and it was a mandatory subject of bargaining. Respondent again violated Section 8(a)(1) and (5) of the Act.

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.
2. The Guild is a labor organization within the meaning of Section 2(5) of the Act.
3. The following employees of Respondent, hereinafter called the unit, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

> All employees employed by the [Respondent] in its editorial division including the assistant news editor, copy desk chief, picture editor, chief photographer, assistant metro editors, assistant features editors, assistant sports editors, Sunday sports editor, editorial writers, letters editor/editorial page secretary, editorial cartoonists, news production coordinator and systems editors, but excluding all interns, editorial division secretaries (confidential), the reader editor, the editor, the managing editor, the assistant managing editor, the associate editor, the graphic editor, the features editor, the metro editor, the news editor, the news office budget manager, the deputy graphics editor, the deputy metro editor, the Kentucky bureau chief, the business editor, the assistant metro editor in charge of outlying bureaus, the sports editor, the chief librarian, and all other supervisors, professional employees, and guards as defined in the Act.

4. On 24 December 1984 the Union was certified as the exclusive collective-bargaining representative of the unit.
5. At all times since 24 December 1984 the Union, by virtue of Section 9(a) of the Act, has been, and is, the exclusive representative of the unit for the purposes of collective bargaining with respect to rates of pay, wages, hours of employment, and other terms and conditions of employment.
6. By discriminatorily maintaining and enforcing a rule since about 22 January 1985 prohibiting the Guild from using Respondent's mailboxes for the distribution of union literature to employees while permitting employees and "accredited" and unaccredited organizations to use such facilities for the distribution of other than union-related literature, Respondent violated Section 8(a)(1) of the Act.
7. By changing the duties and pay of its wire manager sometime in early January 1985 without prior notice to the Guild and without having afforded the Union an opportunity to negotiate and bargain with respect to such act and conduct and the effect of such act and conduct, Respondent violated Section 8(a)(5) and (1) of the Act.
8. By unilaterally changing an assistant features editor position in the unit to a supervisory position about 21 March 1985, without prior notice to the Guild and without affording the Guild an opportunity to negotiate and bargain with respect to such act and conduct and the effect of such act and conduct, Respondent violated Section 8(a)(5) and (1) of the Act.
9. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that Respondent has engaged in certain unfair labor practices, it will be recommended that Respondent cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act. Having found that Respondent discriminatorily denied the Guild access to employee mailboxes, it will be recommended that Respondent reimburse the Guild for its expenditures for use of the U.S. Postal Service. Having found that Respondent violated Section 8(a)(5) and (1) of the Act by changing the duties and pay of its wire manager and by unilaterally changing the assistant features editor position in the unit to a supervisory position, without notice to or bargaining with the Guild, it will be recommended that Respondent rescind these unilateral changes and, henceforth, notify and bargain with the Union concerning any contemplated changes in the wages, hours, working conditions, and other terms and conditions of employment of bargaining unit employees. Respondent will be ordered to make bargaining unit employees whole for any loss of earnings they may have suffered, including interest, in the manner prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), and *Florida*

Steel Corp., 231 NLRB 651 (1977).[6] Respondent will also be ordered to post an appropriate notice.

[Recommended Order omitted from publication.]

[6] See generally *Isis Plumbing Co.*, 138 NLRB 716 (1962)